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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-220

COMMONWEALTH OF KENTUCKY, EX REL
ED W. HANCOCK,
ATTORNEY GENERAL, ..... PETITIONER,

VS:

RUSSELL E. TRAIN, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
ET AL, ..... RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

## REPLY BRIEF FOR PETITIONER

ED W. HANCOCK
Attorney General
Commonwealth of Kentucky
Room 114, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-7600

DAVID C. SHORT
Assistant Attorney General
Commonwealth of Kentucky
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

DAVID D. BEALS
Assistant Attorney General
Commonwealth of Kentucky
Room 26, Capitol Building
Frankfort, Kentucky 40601
Telephone (502) 564-3595

COUNSEL FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

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**MAY IT PLEASE THE COURT:**

### PURPOSE AND NEED FOR THIS BRIEF:

The Commonwealth feels compelled to submit this Brief in an effort to correct some of the several misconstructions and mistaken impressions conveyed and advanced by the respondents with respect to the background of this action, the nature and functioning of this Commonwealth's permit system and of its Implementation Plan as a whole, and the actions taken, or not taken, by the facilities involved. Petitioner further does not believe the re-

spondents' interpretation of the phrase "requirements respecting control and abatement of air pollution," contained in Section 118 of the Act, 42 U.S.C. §1857f., can be harmonized with other sections of the Clean Air Act, as amended, and that this construction is an effort by respondents to minimize and avoid obligations the Congress placed on all air contaminant sources

## BACKGROUND AND OPERATION OF THE KENTUCKY IMPLEMENTATION PLAN:

In the Clean Air Act Amendments of 1970, 42 U.S.C. §1857 et. seq., the Congress prescribed and set forth a clearly discernible plan for the attainment and maintenance of clean air in this country. Basic to this plan was the retention of state responsibility for the quality of the air within their respective geographical limits. However, because the state's acceptance of this responsibility under previous Acts was disappointing, the Congress provided for a means of assuring a responsive program of state implementation. These past implementation problems and the approach employed by Congress for their solution were discussed by this Court in *Train* v. *Natural Resources Defense Council*, ___ U.S. ___, 43 L. Ed. 2d 731, 95 S.Ct. 1470 (April 16, 1975):

> "Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, enacted on December 31 of that year. These Amendments sharply increased federal authority and responsibility in the



> continuing effort to combat air pollution. Nonetheless, the Amendments explicitly preserved the principle that, 'Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .' §107(a) of the Clean Air Act, as added, 84 Stat. 1678, 42 U.S.C. §1857c 2(a). The difference under the Amendments was that the States were no longer given any choice as to whether they would meet this responsibility. For the first time they were required to attain air quality of specified standards, and to do so within a specified period of time." 43 L.Ed. 2d 731, at pp. 737-738, Slip Op., at pp. 2-3.

The "stick" which Congress took to the states to assure attainment of these goals took the form of specific requirements which were to be incorporated into each state's implementation plan. These measures, contained in Section 110 of the Act, 42 U.S.C. §1857c-5, were designed to give assurance that the state air pollution control programs could, at last, be counted on to achieve the goal of clean air. It then became the obligation of the states to devise and formulate a plan, incorporating the measures prescribed in Section 110 of the Act, 42 U.S.C. §1857c-5, which would lead to the implementation and attainment of the air quality standards within a specified time period. These plans, by Congressional design and mandate, were to contain not only emission standards but also a means of implementing and enforcing such standards.

The Kentucky Implementation Plan submitted to the Environmental Protection Agency, and subsequently ap-

proved by the Administrator,[1] contains as its central control mechanism the use of a permit system, a system which coordinates and integrates the functioning of all other regulations in the Kentucky Plan. Respondents' detailed recanting of the Commission's Rules of Practice, Kentucky Administrative Regulation AP-10,[2] as they relate to the Kentucky permit system is of no more value in understanding how this system is designed or how it functions to fulfill this Commonwealth's responsibilities to achieve the goals of the Clean Air Act than examination of the Administrative Procedures Act, 5 U.S.C. §500 et. seq., would be in understanding how any Federal agency discharges its responsibilities under the statute it administers.

The basic approach of the Kentucky Plan is illustrated by the provisions of Kentucky Administrative Regulation AP-1, Section 5(3)(a):[3]

[1]Kentucky's Implementation Plan was originally approved on May 31, 1972. 37 Federal Register 10842. This approval was vacated in the case of **Buckeye Power Co., et al v. EPA, 481 F.2d. 162 (6 CA, June 28, 1973).** The Kentucky Plan was resubmitted and published by the Administrator of Environmental Protection Agency as proposed rule making on March 19, 1974. 39 Federal Register 10277. On August 15, 1974, the Administrator of Environmental Protection Agency published his approval of the re-submitted Kentucky Plan with one exception not relevant to the issues herein. 39 Federal Register 29357.

[2]Respondents' Brief, p. 6.

[3]Subject Kentucky Administrative Regulations are printed in the Appendix submitted to the Court of Appeals For the Sixth Circuit at pp. 99-227.



> "In considering permit applications, the Commission shall determine if emission standards or ambient standards are met. In no case shall a permit to construct or operate be issued where it can be shown through diffusion calculations or actual ambient air quality monitoring, that the air contaminant source will prevent or interfere with the attainment or maintenance of state or federal air quality standards. . . ."

This is the primary criteria upon which this Commonwealth issues or denies a permit and is directly related to the achievement of the goals of the Act. Based on this standard a permit will be issued only if (1) agency analysis of the data submitted reveals that the source is in compliance with the applicable emission standards and does not jeopardize compliance with the ambient standards or (2) the source submits a compliance plan and timetable in accordance with Kentucky Administrative Regulation AP-1, Section 11, which agency analysis demonstrates will bring the source into compliance with these standards by the attainment dates. Thus in Kentucky it is through the functioning of the permit system that compliance schedules come into being, are reviewed by the agency, and are approved, and it is only through the permit system that these compliance schedules, and other requirements of the Kentucky Plan, may be administratively enforced.

Since the formulation and submittal of a compliance schedule is only necessary to satisfy the basic requirement for the issuance of a permit these schedules are treated as conditions to the issuance of the permit and are incorporated under Kentucky Administrative Regulation AP-1, Section 5(4). Similarly, other requirements of the Ken-

tucky Plan are made enforceable as conditions on the issuance of a permit. These include requirements relating to monitoring and the keeping of records, requirements as to sampling and testing, and requirements for dealing with emergency episodes. Kentucky Administrative Regulation AP-1, Sections 6, 7, 8, and 9. The position of the permit system as the core requirement of the Kentucky Plan and as the requirement around which all others are framed is illustrated by Kentucky Administrative Regulation AP-1, Section 1(1):

> "Regulations of the Commission shall be construed in light of the considerations set forth hereinafter which shall guide the Commission in the issuance, modification and revocation of permits."

Moreover, inclusion of these requirements as conditions on the issuance of permits is necessary since the power of the administrative agency under its current regulations is confined to the issuance, denial, revocation, or modification of permits. Further, once a permit is issued it may only be revoked or modified upon a finding that the source (a) has failed to comply with the terms and conditions of its permits, (b) has failed to comply with the applicable emission standards, (c) has failed to comply with the ambient air standards. Kentucky Administrative Regulation AP-1, Section 5(5).

The permit system is a cohesive and comprehensive mechanism which results in a single document incorporating all the requirements of the Kentucky Plan and is a system through which the Kentucky Department For Natural Resources and Environmental Protection may review each air contaminant source in Kentucky and make



a determination as to that source's compliance with the standards of the Act. It is a system which fulfills all the requirements of Section 110 of the Clean Air Act, 42 U.S.C. §1857c-5, as was determined by the Administrator of the Environmental Protection Agency, and if allowed to function would achieve the goals of the Act.

The response of the Federal facilities to this Commonwealth's request for cooperation in the implementation of the Kentucky Plan fell far short of the level needed to make the Plan work. Respondents complied only to the extent of providing the initial data necessary for the first preliminary steps in the Commonwealth's control program. After submitting registration and initial assessment data together with letters assuring future cooperation, all semblance of cooperation ceased. Although analysis of the initial data demonstrated a lack of compliance in most cases and the need for additional controls, none of the facilities submitted compliance schedules for review and approval by the administrative agency, nor have any such shedules yet been submitted for such analysis and approval. In some cases, the state agency was told what the source intended to do to bring itself into compliance but no state review of these compliance plans was ever permitted. This refusal, by respondents to submit to the state's permit program review has had the result of removing from any agency review the control activities of several of this state's largest pollution sources, and at least one major source continues to operate under a compliance schedule which the state has publicly declared is not acceptable under the Kentucky Plan. Nonetheless, this source, Tennessee Valley Authority's Shawnee Power Plant, continues to proceed on the course set by itself alone while

the Commonwealth's protests are ignored. In addition to the refusal to prepare compliance schedules in accordance with the Kentucky Plan and to submit these plans for administrative review there are several other instances where the cooperation of these respondents has been unsatisfactory. There have been no periodic reports as required in the Kentucky Plan but rather information has been supplied only upon specific request. Monitoring and sampling techniques which are unacceptable to the state have been employed, resulting in the production of unreliable data. And as a general statement, cooperation with the state has been limited to the providing of data reflecting only the current status of Federal facilities, and only when such information is specifically requested. In the absence of compliance with the state's permit system there has been no opportunity for the meaningful administrative review necessary to assure the pollution control measures employed by these facilities are adequate to assure that this Commonwealth's attainment of the ambient air quality standards will not be jeopardized. This is not proper cooperation with the state nor is this conduct in accord with the proper implementation or enforcement of the requirements of the Clean Air Act, as amended.

## RESPONDENTS' CONSTRUCTION OF THE SECTION 118 PHRASE, "REQUIREMENTS RESPECTING CONTROL AND ABATEMENT OF AIR POLLUTION":

The basic contention of the respondents is that the phrase "requirements respecting control and abatement of air pollution" in Section 118, 42 U.S.C. §1857f., refers to,



and directs compliance with, only "the applicable emission standards and compliance schedules promulgated by the particular state pursuant to their EPA-approved plan to establish and maintain national air quality standards." (Respondents' Brief, p. 19). However, this overlooks and ignores the fact that the formulation of compliance plans and timetables pursuant to the Kentucky Plan involves and necessitates the proper operation of the permit system, the mechanism through which the state may review the control strategies proposed by each air contaminant source and make the necessary determination that in each case these plans will indeed bring the source into compliance with the applicable standards by the attainment date and will not jeopardize the attainment of the ambient standards. None of the respondents herein have submitted their control strategies for this review and none is committed to a compliance schedule approved under, or pursuant to, the Kentucky Plan. Thus, while paying lip service to the "EPA-approved plan," respondents nonetheless ignore this plan, proceeding as if each source may develop its own compliance schedule free from administrative review or approval and may satisfy the requirements of the Clean Air Act by adhering to this self-generated and unreviewed schedule. Despite adherence to these announced "compliance schedules," this approach leads, as it has in Kentucky, to the situation where, due to the lack of prior state approval, the so-called "compliance schedule" is such that compliance may not be achieved and attainment of the ambient standards will be jeopardized.

In addition to this internal inconsistency with regard to the manner of the creation of compliance schedules and the admitted need to comply with such schedules, the

respondents' contention as to their compliance obligation excludes requirements relating to monitoring, records, reporting, sampling and testing methods, and procedures for air pollution emergencies, which, presumably, are "procedural" requirements of the Kentucky Plan with which respondents need not comply. This narrow view of the term "requirements" does not, however, coincide with the requirements the Congress felt would be necessary to provide for the attainment and maintenance of the national air quality standards and which were expressed in Section 110 of the Act, 42 U.S.C. §1857c-5. In this section, the Congress specified those requirements which were to be imposed through the operation of the state implementation plans. Clearly, no plan could be approved by the Administrator unless such requirements were incorporated; just as clearly, there exists no basis for making a differentiation within which some of these requirements may be designated "requirements respecting control and abatement of air pollution" and some may not. However, it is just such a differentiation which respondents seek to construct from other sections of the Act.

Respondents' reliance upon Section 110(e), 42 U.S.C. §1857c-5(e), is, however, not helpful in such a construction. This section provides that the *states* can request and obtain an extension of the attainment dates for the primary standard and is limited to "requirements . . . which implement such primary standard." This extension of attainment dates does not effect what requirements need be applied, nor does it exempt any source from any requirements, but rather provides only that the states may approve compliance schedules which delay compliance an additional two (2) years. Further, such extensions are



limited to situations where the state plan does provide for implementation of the standards for all sources for which compliance is possible and further that the plan provides interim measures of control as are deemed reasonable for those sources for which compliance is not technologically possible.[4] Moreover, respondents' conclusion that the operation of the state's permit system requires no technological sophistication[5] is simply out of touch with the realities of air pollution control and the manner of implementating technological advances. It is through the use of this system that compliance schedules may be modified or formulated to reflect these advances.

Equally unenlightening as to the meaning of "requirements" is respondents' discussion of Section 111 of the Senate Bill.[6] This section is substantially the same as Section 110 of the Act and imposes the same obligations upon the state. Under Section 111 of the Senate Bill, a state implementation plan could only be approved by the "Secretary" if he determined the plan contained a number of specified requirements, including both emission requirements and "appropriate procedures, including but not limited to, . . . permits, for insuring that any source of air pollution agents . . . will be located, operated, . . . designed, constructed, and equipped in such a way that such sources will not interfere with implementation, maintenance, and enforcement of any applicable air quality

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[4] §110(e)(2), 42 U.S.C. §1857c-5(e)(2).

[5] Respondents' Brief, p. 21.

[6] S. 4358, 91st Congress, 2d. Session (1970).

standard and goal." Section 111(a)(2)(D), S. 4358, 91st Cong., 2d. Sess. (1970). In addition to being an excellent description of the functions performed by the permit system of the Kentucky Plan, this section also demonstrates that the Senate felt achievement of the goals of the Act would require more than the imposition of emission standards. This section serves only to demonstrate further that the Congress did not regard emission standards as the exclusive requirements relating to the control and abatement of air pollution.

Respondents' reliance on Section 111 and Section 112 of the Act, 42 U.S.C. §1857c-6 and §1857c-7, are also misplaced. These sections deal with new sources and hazardous pollutants, areas in which the Administrator has exclusive control of the standards and also where enforcement authority is exclusively reserved to the Administrator with respect to federal sources. The differentiation between new and existing sources and the problems associated with the control of each was discussed by the Court of Appeals For the Fifth Circuit in *Alabama* v. *Seeber*, 502 F. 2d 1238, Petition For Writ of Certiorari pending, *sub nom. Seeber* v. *Alabama*, No. 74-851, (also reprinted in Petitioner's Supplemental Memorandum to Petition For Writ of Certiorari as Appendix "D"):

> "With respect to existing stationary sources of air pollution the Act places the primary responsibility for setting and enforcing emission standards or limitations on the states. EPA, pursuant to §109 of the Act [42 U.S.C. §1857c-4] establishes primary and secondary ambient air quality standards, and the



states, pursuant to §110 [42 U.S.C. §1857c-5] establish, subject to approval by EPA, implementation plans geared to meeting the air quality standards . . .

Sections 111, 112, and 114 [42 U.S.C. §§1857c-6, 1857c-7, and 1857c-9] of the Act explicitly exempt certain federal facilities from state authority to enforce requirements established by EPA pursuant to those sections. Those sections deal with specialized emission standards for new sources and hazardous pollutants and with recordkeeping, inspection and monitoring requirements established directly by EPA. In view of these explicit exemptions for federal facilities, particularly the exemptions in §§111 and 112, which like §110 establish control schemes for certain classes of air pollution sources, the absence of any such exemption in §110 suggests that the provisions of implementation plans adopted and approved pursuant to that section, including provisions for state enforcement of emission limitations through permit systems, are applicable to federal facilities.

The general scheme that emerges from the Act as a whole appears to be that responsibility and authority for enforcement with respect to federal facilities is granted to the states for sources with respect to which state implementation plans establish the criteria for enforcement, and is granted to EPA in those instances (i.e., new sources and hazardous pollutants) where EPA establishes the criteria. The scheme is a reasonable one. Because of variations in air quality between states and regions the emissions criteria established under state plans may vary con-

siderably, thus making enforcement by EPA against scattered federal facilities administratively difficult. The new source and hazardous pollutant criteria established by EPA, however, are not tied to air quality standards and may, therefore, vary little or not at all by area, making EPA enforcement against federal facilities more convenient." *Alabama* v. *Seeber, supra,* at pp. 1243-44, (Appendix "D", pp. 9d-13d).

The most important inference which can be drawn from these sections is, then, that where the Congress wished to exclude Federal facilities from outside control, they did so expressly and in specific language such as that contained in Sections 111 and 112 but which is notably absent from Sections 110 or 118.

Further, Section 111 does speak specifically of state control over existing sources. Section 111(d) provides that if the Administrator has set a standard of performance for a new source which calls for an air quality criteria for a pollutant which is not included in the state plan, the state is required to impose a standard for the pollutant with regard to existing sources. This further demonstrates that control of air pollution from existing suorces was to be accomplished through the operation of state implementation plans. Respondents, however, suggest that such control is to be accomplished through the use of court action pursuant to Section 304 of the Clean Air Act, as amended, 42 U.S.C. 1857h-2.

Respondents' interpretation of Section 304 of the Act renders the provisions of Section 118, 42 U.S.C. §1857f., superfluous, having no operative effect whatsoever. No reference to Section 118 is necessary to determine that Section 304 subjects Federal facilities to action for violation of emission standards and compliance schedules; Section 304 quite clearly and expressly states such liability. In addition to the fact that Congress foresaw an entirely different function for "citizen suits" than do the respondents herein, the interpretation advanced by the respondents places the implementation of the Clean Air Act squarely and exclusively on the courts with no resort to any administrative processes. Instead of utilizing the administrative framework prescribed by the Congress in Section 110, 42 U.S.C. §1857c-5, and made applicable through Section 118, respondents contend that each Federal source is to see to its own compliance or be subject to court action. The construction advanced does not, therefore, take any cognizance of any necessity for administrative planning or review and does not accord Section 118 any meaning save as a restatement of the requirements imposed in Section 304. However, such planning and review was, and is, quite clearly necessary. As this Court stated in *Train* v. *Natural Resources Defense Council,* ____ U.S. ____, 43 L.Ed. 2d 731, 95 S.Ct. 1470 (Apri 16, 1975):



> "No one can doubt that Congress imposed upon the Agency and States a comprehensive planning task of the first magnitude which was to be accomplished in a relatively short time." 43 L.Ed. 2d 731, at p. 739, Slip Op. at p. 6.

The authority of the states to carry out their plans with respect to Federal sources is, we submit, contained in Section 118. There can be no explanation for the existence of Section 118 if it imposes no obligations other than those

imposed under Section 304, and there is no reasonable explanation for the inclusion of additional requirements prescribed in Section 110 if such requirements are not "requirements respecting control and abatement of air pollution."

Respondents cite numerous authorities in support of the proposition that the administrative interpretation of the Clean Air Act is entitled to deference by this Court. The position of the respondent Environmental Protection Agency would be entitled to greater weight in this action if the advice given had been followed or if the agency had taken any timely action to assure its advice was carried into action. However, the recommendations of the Environmental Protection Agency were not followed by the operating respondents and the Environmental Protection Agency took no action to see the instructions were carried out until May of 1975.

In the October 17, 1972, letter sent to the respondents herein, the Environmental Protection Agency made the following recommendation:

> "We recommend that each Federal facility under your jurisdiction which has an air pollution discharge should initiate immediate discussion, if it has not already been accomplished, with the respective states, regarding development of a compliance schedule as required by their implementation plan. This compliance schedule should include the standards or emission limitations which must be met, the abatement equipment to be constructed, corrective measures to be taken, and the timetable for taking these actions in order to meet established implementation plan deadlines. Your agency will be obligated under the compliance schedule to conduct monitoring and to keep operating records." (Appendix, pp. 57-58).



Despite this advice, respondents did not develop compliance schedules as required by Kentucky's Implementation Plan. No such schedules were submitted for the approval of the state agency and few of these self-generated and unreviewed plans were discussed with the state. The Kentucky Implementation Plan provides for the participation of the state's air pollution control agency in the formulation of these compliance schedules through the operation of the permit system and it is through the operation of this system that each of the determinations necessary to prescribe the requisite controls, listed in the Environmental Protection Agency's recommendations, are made.

The recommendation was made in October of 1972, and yet it was not until May of 1975, scant months in advance of the attainment date for most pollutants,[7] that the Environmental Protection Agency felt it necessary to check on the compliance status of Federal installations or to prescribe guidelines for the formulation of control

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[7]The attainment date for the Commonwealth of Kentucky was July 1, 1975, except with respect to emissions of sulfur-dioxide. Pursuant to the request of the Governor of Kentucky the Commonwealth's attainment date for sulfur-dioxide concentrations has been extended to July 1, 1977.

strategies for sources not currently in compliance.[8] As respects the timely attainment of the national standards of air quality, the planning, in May of 1975, of the control measures necessary to bring Federal air contaminant sources into compliance is simply too late. Had the agency taken action at the time of the breakdown of the administrative process they themselves approved, such determinations would have been made in 1972 or 1973, as they should have been under the Kentucky Implementation Plan.

Moreover, the conclusion stated in the letter sent by the Environmental Protection Agency with respect to Federal compliance with state requirements either does not apply to a permit system such as that employed in Kentucky or ignores the nature and operation of such a system. The letter concludes:

> "[w]e do not believe that Federal agencies are required to apply for state operating permits or to register their discharge or emission if the registration process is in effect a permit application that will lead automatically to issuance of a state permit or license." (Appendix, p. 58).

[8]Respondent Russell E. Train, Administrator of the Environmental Protection Agency, issued an order entitled "Compliance with Stationary Source Air Pollution Standards; Federal Agencies Guidelines" on May 6, 1975. This Order was published in the Federal Register on May 12, 1975, and stated as its purpose:

> "The purpose of this guideline is to provide a means to determine the compliance status of all Federal stationary sources of air pollutants which are subject to Federal, State, and local emission limitations and establish firm public commitments to abate emissions as expeditiously as practical from the facilities exceeding limitations." 40 Fed. Reg. 20664, May 12, 1975.



As can be readily seen from the above, the Environmental Protection Agency's position that state operating permits are not required for Federal facilities was limited by the condition "*if* the registration process is in effect a permit application that will lead automatically to issuance of a state permit of license." (Emphasis Added). The submission of a permit application to the Kentucky Department For Natural Resources and Environmental Protection does not, under any reasonable construction of the Kentucky Implementation Plan, lead automatically to, or guarantee, the issuance of a permit. In fact, no permit may be issued until after the formulation, review and ultimately the approval of the applicant's compliance schedule and the formulation and imposition of such monitoring and reporting conditions as are necessary to assure the control strategy is implemented in a timely manner and is functioning up to expectations. Such determinations are certainly not automatic but rather require extensive administrative analysis and planning.

As a further administrative interpretation of the responsibilities of Federal air contaminant sources under the Clean Air Act, the respondents cite Executive Order 11752. This Order superceded Executive Order 11507[9] and was

[9]Executive Order 11507, 35 Fed. Reg. 2573 (February 4, 1970) entitled "Prevention, Control and Abatement of Air and Water Pollution at Federal Facilities."

issued by President Nixon on December 19, 1973, after the initiation of this and similar actions in California and Alabama. Executive Order 11752 differed from Executive Order 11507 in few respects. The primary change is reflected in the position that Federal facilities should not comply with state or local administrative procedures. In contrast, Executive Order 11507 directed that Federal facilities were to conform to air quality standards as defined in Section 2(d) of that Order, which read in part:

> "The term air and water quality standards shall respectively mean the air quality standards *and related plans of implementation* including emission standards, adopted pursuant to the Clean Air as amended . . ." (Emphasis Added).

The reversal of this position after the initiation of legal actions against agencies under Executive control, including respondents herein, demonstrates the self-serving nature of Executive Order 11752 and as such this interpretation should be accorded no weight by this Court.

## CONCLUSION

The regulatory scheme which emerges from an examination of the Clean Air Act as a whole does not, and has not been shown to, support respondents' contention that "requirements respecting control and abatement of air pollution," made applicable by Section 118, 42 U.S.C. §1857f., are limited to emission standards and self-generated compliance schedules. The control of air pollution from existing stationary sources was, and is, to be accomplished through the operation of state implementation plans containing all the requisite controls specified in Section 110 of the Act, 42 U.S.C. §1857c-5. The Congress directed that the Administrator could not approve any implementation plan unless each of the eight requisites specified in Section 110(a)(2) was incorporated in such plan. There exists no rational basis for differentiating the one provision requiring the incorporation of emission standards and compliance schedules from the other seven elements required to be incorporated. Each was considered necessary to assure achievement of the goals of the Act and each is a "requirement respecting control and abatement of air pollution." By limiting these Section 118 requirements so that they would be identical to the requirements which respondents are subject to by virtue of Section 304, 42 U.S.C. §1857h-2, the respondents have rendered Section 118 utterly without operative effect and they successfully avoid, as governmental agencies, the obligations imposed by Congress on all citizens in the Clean Air Act.

For these and the foregoing reasons, the Judgments of the United States District Court For the Western District of Kentucky and the United States Court of Appeals For the Sixth Circuit should be reversed and an Order entered granting Petitioner's Motion For Summary Judgment and requiring respondents herein to comply with the provisions of Kentucky's Implementation Plan For the

Attainment and Maintenance of National and State Ambient Air Quality Standards, as required by the Clean Air Act, as amended.

Respectfully Submitted,

**ED W. HANCOCK**
**ATTORNEY GENERAL**
**COMMONWEALTH OF KENTUCKY**

**Room 114, Capitol Building**
**Frankfort, Kentucky 40601**
**Telephone (502) 564-7600**

**By: DAVID C. SHORT**
**ASSISTANT ATTORNEY GENERAL**
**COMMONWEALTH OF KENTUCKY**

**By: DAVID D. BEALS**
**ASSISTANT ATTORNEY GENERAL**
**COMMONWEALTH OF KENTUCKY**

**Room 26, Capitol Building**
**Frankfort, Kentucky 40601**
**Telephone (502) 564-3595**

**COUNSEL FOR PETITIONER.**



**CERTIFICATE OF SERVICE:**

The undersigned hereby certifies that the herein *REPLY BRIEF* for petitioner Commonwealth of Kentucky ex rel Ed W. Hancock, Attorney General, was served by mailing three copies hereof, via United States mail, air mail postage prepaid, to: Honorable Robert H. Bork, Solicitor General, Honorable A. Raymond Randolph, Jr., Deputy Solicitor General, and Honorable Harry R. Sachse, Assistant Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530; Honorable Edward Levi, Attorney General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Wallace H. Johnson, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Robert L. Klarquist, Attorney, Appellate Section, Land and Natural Resources Division, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Jacques B. Gelin, Attorney, Department of Justice, Tenth and Constitution Avenue, Washington, D.C., 20530; Honorable Robert H. Marquis, General Counsel, Honorable Herbert S. Sanger, Jr., Deputy General Counsel, Honorable Beauchamp E. Brogan, Associate General Counsel, and Honorable Justin M. Schwamm, Assistant General Counsel, Tennessee Valley Authority, New Sprankle Building, Knoxville, Tennessee, 37901; Honorable G. Wilson Horde, General Counsel, Union Carbide Corporation, Post Office Box Y, Oak Ridge, Tennessee, 37830; Honorable Evelle J. Younger, Attorney General, Honorable Robert H. O'Brien, Assistant Attorney General, Honorable Carl Boronkay, Assistant Attorney General, Honorable Nicholas C. Yost,

Deputy Attorney General, Honorable Roderick Walston, Deputy Attorney General, Honorable Daniel Taaffe, Deputy Attorney General, and Honorable C. Foster Knight, Deputy Attorney General, State of California, 110 West "A" Street, Suite 600, San Diego, California, 92101; Honorable Arthur K. Bolton, Attorney General, and Honorable Robert E. Hall, Assistant Attorney General, State of Georgia, 132 State Judicial Building, Atlanta, Georgia, 30334; Honorable Louis J. Lefkowitz, Attorney General, Honorable Samuel A. Hirshowitz, First Assistant Attorney General, Honorable Philip Weinberg, Assistant Attorney General, and Honorable Richard G. Berger, Assistant Attorney General, State of New York, Two World Trade Center, New York, New York, 10047; Honorable John J. Hill, Attorney General, Honorable David M. Kendall, First Assistant Attorney General, and Honorable Philip K. Maxwell, Assistant Attorney General, State of Texas, Supreme Court Building, Austin, Texas, 78711; Honorable Andrew P. Miller, Attorney General, and Honorable J. Thomas Steger, Assistant Attorney General, Commonwealth of Virginia, Supreme Court Building, 1101 East Broad Street, Richmond, Virginia, 23219; and by mailing three copies hereof, via United States mail, postage prepaid, to: Honorable George J. Long, United States District Attorney, Western District of Kentucky, Room 211, United States Courthouse, Sixth and Broadway, Louisville, Kentucky, 40202; and by mailing copies hereof, via United States mail, postage prepaid, to: Honorable James F. Gordon, Judge, United States District Court, Western District of Kentucky, United States Courthouse, Louisville, Kentucky, 40202; and Honorable Lester L. Cecil, Senior Circuit Judge, Honorable Pierce Lively, Circuit



Judge, and Honorable Paul C. Wieck, Circuit Judge, United States Court of Appeals For the Sixth Circuit, 608 United States Courthouse Building, Cincinnati, Ohio, 45202, and further the undersigned hereby certifies that all parties required to be served in this action have been served, all this the 10 day of September, 1975.

ED W. HANCOCK
ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

David C. Short

By: DAVID C. SHORT
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY

David D. Beals

By: DAVID D. BEALS
ASSISTANT ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY